NCK Wire Products Sdn Bhd v Konmark Corp Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D7–28–616 OF 1999
T SELVENTHIRANATHAN J
11 APRIL 2000

Companies and Corporations *— Winding up — Application to strike out winding up petition — Inability to pay debts — Dispute as to claim for interest — Petitioner abandoning interest claim — Dispute as to amount arose at striking out stage, whether too late — Whether application should be allowed*

The petitioner issued notices to the respondent in order to claim the amounts stipulated in the notices as a debt due for goods sold and delivered to the respondent. As the respondent did not pay within the period allowed, the petitioner filed these proceedings to wind up the respondent. The respondent then filed, after the last of the petitioner's s 218 notices, two applications to strike out the petition and to restrain the petitioner from proceeding against the respondent with winding up proceedings, disputing for the first time the amount indebted to the petitioner.

Held, dismissing the applications with costs to the respondent:

(1) The late payment interest imposable was the only aspect of the dealings between the petitioner and the respondent in respect of which the respondent was seeking some indulgence, without even disputing the same. However, this aspect of the dealings becomes a non-issue in the light of the petitioner abandoning altogether any claim for interest (see p 59F).

(2) It behoved the respondent to have come out with such an answer very much earlier in the prevailing circumstances and as the respondent failed to do so, it could only mean that the very late and delayed response was contrived to stave off the threatened winding up proceedings (see p 59H).

[Bahasa Malaysia summary

Pempetisyen telah mengeluarkan notis-notis kepada responden bagi tujuan menuntut jumlah yang dinyatakan di dalam notis-notis tersebut sebagai hutang yang perlu dibayar untuk barang-barang yang dijual dan dihantar kepada responden. Memandangkan responden tidak membayar di dalam tempoh yang dibenarkan, pempetisyen telah memfailkan prosiding-prosiding ini untuk menggulungkan responden. Responden kemudiannya telah memfailkan, setelah notis-notis s 218 pempetisyen yang terakhir, dua permohonan untuk membatalkan petisyen tersebut dan untuk menghalang pempetisyen daripada meneruskan prosiding terhadap responden dengan

prosiding penggulungan tersebut. Respondent mempertikaikan untuk pertama kalinya jumlah terhutang yang perlu dibayar kepada pempetisyen.

Diputuskan, menolak permohonan-permohonan dengan kos kepada responden:

(1) Respondent hanya memohon kelonggaran tanpa mempertikaikan faedah bayaran lewat yang dikenakan dari aspek urusan-urusan antara pempetisyen dan responden. Bagaimanapun, aspek urusan ini bukan menjadi satu persoalan berhubung dengan pempetisyen menghentikan apa-apa tuntutan untuk faedah sama sekali (lihat ms 59F).

(2) Sepatutnya responden patut tiba kepada jawapan sedemikian lebih awal lagi di dalam keadaan ini dan memandangkan responden telah gagal untuk berbuat demikian, ia mungkin sekali bermaksud bahawa jawapan yang amat lewat dan tergendala tersebut adalah ikhtiar untuk mengelakkan ugutan prosiding-prosiding penggulungan (lihat ms 59H).]

Notes

For cases on application to strike out winding up petition, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) para 765.

Case referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Bank Bhd [1995] 3 MLJ 331 (refd)

Legislation referred to

Companies Act 1965 s 218

Alex Chang (*Alex Chang & Co*) for the petitioner.
KW Yap (*KW Yap Cheng & Partners*) for the respondent.

T Selventhiranathan J:

Enclosures 10 and 13

The petitioner issued various notices to the respondent under s 218 of the Companies Act 1965 ('s 218 notice(s)') claiming the amounts stipulated in the notices as a debt due for goods sold and delivered to the respondent. The final amount stipulated as due and owing was RM479,709.97, whereby the petitioner abandoned its claim for interest on the outstanding amount. As the respondent did not pay within the period allowed, the petitioner filed these proceedings to wind up the respondent.

The respondent then filed the two applications herein vide encls 10 and 13 respectively to strike out the petition and to restrain the petitioner from

proceeding against the respondent with winding up proceedings. The grounds on which the two applications were based are contained in the supporting affidavits of the respondent and are elaborated upon in the submissions of counsel for the respondent. In a nutshell, the respondent contended that as it disputed the amount said to be due and owing and as the petitioner had failed to obtain judgment for the amount prior to bringing these winding up proceedings against the respondent, there was a serious question to be tried which disentitled the petitioner to apply to wind up the respondent.

The parties filed copious affidavits to state their respective cases and to reply to the case for the opposite side, sometimes unnecessarily and long windedly. This practice is to be deprecated in proceedings of this nature and it behoves a genuine petitioner to keep its story short and to the point unless his counsel, unwittingly and through the multiple affidavits filed, wishes to create the impression in the mind of the court that his client's case is not that clear cut and strong, as contended.

The crux of the matter in the respondent's two applications herein, despite the purported issues raised, is whether the respondent is indeed indebted to the petitioner for the amount claimed and is unable to pay its debt.

There is, in evidence, the respondent's own letter of 21 October 1998, whereby reference was made to a meeting of the parties' representatives on 7 October 1998 and the respondent forwarded two post dated cheques in payment of two invoices in the sum of RM20,000. There was no mention in this letter of any dispute of the total amount owing or the like. It only raised the following in respect of interest payments:

> Meanwhile, *as* discussed and *agreed, kindly review the late payment interest.* (Emphasis added.)

If at all, the late payment interest imposable was the only aspect of the dealings between the petitioner and the respondent in respect of which the respondent was seeking some indulgence, without even disputing the same. However, this aspect of the dealings becomes a non-issue in the light of the petitioner abandoning altogether any claim for interest.

I note that it was only after the last of the petitioner's s 218 notices dated 1 March 1999 was issued that the respondent designed to reply to it as per exh 'WPM-9' dated 31 March 1999 in encl 9, raising for the first time the purported issues forming the substratum of the respondent's said two applications adverted to earlier. However, on the basis of the decision of the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Bank Bhd* [1995] 3 MLJ 331, it behoved the respondent to have come out with such an answer very much earlier in the prevailing circumstances and as the respondent failed to do so, it could only mean that the very late and delayed response was contrived to stave off the threatened winding up proceedings.

In the circumstances, I find that the applications in encls 10 and 13 have no merit, and I accordingly dismiss each of them with costs to be

taxed and paid by the respondent to the petitioner, unless otherwise agreed upon.

Applications dismissed with costs.

Reported by Wong Ee Lynn